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No. 96-7901

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD F. TREST,

Petitioner,

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals entertaining a state prisoner's federal habeas corpus claims is foreclosed from reviewing the claims on the merits and must consider *sua sponte* the affirmative defense of procedural default where the State has never asserted the defense and the state courts have not relied on it in addressing petitioner's claims.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT:

I. THE COURT OF APPEALS ERRED IN INVOKING PROCEDURAL DEFAULT WHERE PETITIONER PROPERLY EXHAUSTED THE STATE REMEDIES OF LOUISIANA RATHER THAN MISSISSIPPI IN ATTACKING HIS HABITUAL OFFENDER STATUS IN LOUISIANA 3

A. Petitioner Committed No Procedural Default By Exhausting His Remedies In The State Courts of Louisiana Rather than Mississippi 4

B. The Federal Courts Could Properly Entertain Petitioner's Attack On The Enhancement Of His Louisiana Sentence With Mississippi Predicates Where The Louisiana Post-Conviction Courts Have Entertained His Enhancement Claims 6

Page

II. THE STATE'S WAIVER OF PROCEDURAL DEFAULT ORDINARILY SHOULD BIND THE COURT OF APPEALS ABSENT A JURISDICTIONAL DEFECT OR THE RARE INSTANCE OF A CLEARLY ARTICULATED NONJURISDICTIONAL VALUE THAT TRANSCENDS THE INTERESTS OF THE PARTIES 9

III. THE COURT OF APPEALS ERRED IN "SANDBAGGING" THE LITIGANTS BY CONSIDERING PROCEDURAL DEFAULT *SUA SPONTE* WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Beck v. Alabama, 447 U.S. 625 (1980) 9

Boykin v. Alabama, 395 U.S. 238 (1969) 2, 5

Caspari v. Bohlen, 510 U.S. 383 (1994) 10

Cooper v. Oklahoma, 116 S.Ct. 1373 (1996) 1

Crank v. Duckworth, 905 F.2d 1090 (7th Cir. 1990) . . . 7

Custis v. United States, 511 U.S. 485 (1994) 7

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) . 13, 14

Estelle v. Smith, 451 U.S. 454 (1981) 9

Fagan v. Washington, 905 F.2d 1155 (7th Cir. 1991) . . 10

Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) 10

Fay v. Noia, 372 U.S. 391 (1963) 11

Ford v. Georgia, 498 U.S. 411 (1991) 9

Garlotte v. Fordice, 115 S.Ct. 1948 (1995) 6

Granberry v. Greer, 481 U.S. 129 (1987) . . 3, 10, 11, 12

Gray v. Netherland, 116 S.Ct. 2074 (1996) 10

Hagan v. Utah, 510 U.S. 399 (1994) 12

Hardiman v. Reynolds, 971 F.2d 500 (10th Cir. 1992) . . 14

Harris v. Reed, 489 U.S. 255 (1989) 8, 10 11

Henderson v. Thieret, 859 F.2d 492 (7th Cir. 1988) . . . 10

Jenkins v. Anderson, 447 U.S. 231 (1980) 9

TABLE OF AUTHORITIES (continued)

Page(s)

Lindh v. Murphy, 65 U.S.L.W. 4557 (June 23, 1997) . . 11

Lugo v. Keane, 15 F.3d 29 (2d Cir. 1994) 14

Maleng v. Cook, 490 U.S. 488 (1989) 6, 7

McCleskey v. Zant, 499 U.S. 467 (1991) 10

Montana v. Egelhoff, 116 S.Ct. 2013 (1996) 1

Parke v. Raley, 506 U.S. 20 (1992) 6

Schiro v. Farley, 510 U.S. 222 (1994) 9

Smith v. Farley, 25 F.3d 1363 (7th Cir. 1994) 7,8

Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) 10

Shepard v. Foltz, 771 F.2d 962 (6th Cir. 1985) 4

Sones v. Hargett, 61 F.3d 410 (5th Cir. 1995) 4, 13

State v. Johnson, 548 So. 2d 1274 (La. Ct. App. 1989) . . 6

State v. Martin, 427 So. 2d 1182 (La. 1983) 6

State v. Shelton, 621 So. 2d 769 (La.1993) 6

State v. Wilson, 599 So. 2d 321 (La. Ct. App. 1992) . . 6

State v. Youngblood, 647 So. 2d 1388 (La. Ct. App. 1994) 6

Tredway v. Farley, 35 F.3d 288 (7th Cir. 1994) 7

Trest v. Whitley, 94 F.3d 1005 (5th Cir. 1996) 4

Ulster County Court v. Allen, 442 U.S. 140 (1979) . 3, 9, 12

United States v. Cullum, 47 F.3d 763 (5th Cir. 1995) . . 14

TABLE OF AUTHORITIES (continued)

Page(s)

United States v. Warner, 23 F.3d 287 (10th Cir. 1992) . 14

Urdy v. McCotter, 773 F.2d 652 (5th Cir. 1985) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 11, 13

Willis v. Collins, 989 F.2d 187 (5th Cir. 1993) 7

Miscellaneous:

Antiterrorism and Effective Death Penalty Act of 1996 . . 11

La. Code Crim. Proc. Article 924 *et seq* 5

La. Rev. Stat. §15:529.1 . . . . . 3, 5

James S. Liebman & Randy Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2d ed. 1994) . 12

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the Nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . and Promote the proper and fair administration of criminal justice." NACDL has 9,000 members nationwide — along with 78 state and local affiliate organizations numbering 25,000 members — including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. NACDL has a long-standing tradition of demonstrated interest in safeguarding the rights of all persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice. It has appeared before this Court on many occasions as *amicus curiae*. *See, e.g.*, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996); *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996).[1]

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in *sua sponte* invoking procedural default where the Louisiana state and federal

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[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

courts had not relied upon it nor was it raised by the state. Petitioner need not return to the Mississippi courts to attack his predicate convictions where the Louisiana courts, which imposed multiple offender status, entertained his *Boykin* claims against the Mississippi predicates and did not invoke procedural default. He thus exhausted the necessary judicial remedies of the state under whose jurisdiction he was presently in custody.

2. The state's waiver of procedural default ordinarily should bind the Court of Appeals absent a jurisdictional defect or the rare instance of a clearly articulated nonjurisdictional value, such as comity or federalism. In this case, where the state courts entertained petitioner's claims and did not invoke procedural default, there is no institutional value for the federal courts to vindicate by enforcing state procedural rules more rigorously than the state courts themselves.

3. The Court of Appeals should not have summarily invoked Mississippi procedural law without first giving the parties notice and an opportunity to respond to its possible misinterpretation of Louisiana and federal law. The federal courts exercising habeas jurisdiction should be required to give the parties notice before taking such summary action.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INVOKING PROCEDURAL DEFAULT WHERE PETITIONER PROPERLY EXHAUSTED THE STATE REMEDIES OF LOUISIANA RATHER THAN MISSISSIPPI IN ATTACKING HIS HABITUAL OFFENDER STATUS IN LOUISIANA

At first blush, this case appears to present a question of federal law analogous to that previously considered in *Granberry v. Greer*, 481 U.S. 129 (1987) — whether the federal courts of appeals must give *sua sponte* consideration to a state prisoner's procedural default in state court where the state has waived its affirmative defense of procedural default in the federal proceeding.

Upon closer scrutiny, however, it becomes clear that this case presents an even more fundamental question antecedent to the state's alleged "waiver" — *viz.*, whether the courts of appeals must consider procedural default *sua sponte* where the state courts themselves never relied on it and have otherwise entertained the habeas petitioner's claims.

In this case, petitioner presented his challenges to his antecedent Mississippi state convictions to the Louisiana state courts which declared him a habitual offender based upon those earlier out-of-state convictions. La. Rev. Stat. §15-529.1. The Louisiana state (and federal) courts denied his claims without considering any alleged failure to present his claims to the Mississippi courts in the first instance.

Indeed, there is no suggestion in the record that Louisiana prosecutors defending this action ever argued procedural default in the state (or federal) courts based on failure to present these claims to the Mississippi courts. *See, e.g., Ulster County Court v. Allen*, 442 U.S. 140, 149, 152 (1979);

Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985)("if the state prosecutor only argued the merits of the petitioner's claim before the state courts and never raised the procedural default issue, the federal courts may assume that the state courts relied only on the merits").

Accordingly, where the Louisiana courts declaring him a habitual offender entertained petitioner's post-conviction attacks on his antecedent Mississippi convictions, there was no need for him to pursue his claims in the Mississippi courts in order to exhaust his state remedies. Petitioner thus did not default his claims when he pursued them in the state courts of Louisiana rather than those of Mississippi. Indeed, the prosecutor in this case has conceded as much (State's Cert. Opp. 2).

The Court of Appeals, then, was clearly in error in its *sua sponte* reliance on *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995), in finding petitioner time-barred from collaterally attacking his Mississippi convictions in the Mississippi courts. *Trest v. Whitley*, 94 F.3d 1005, 1007-08 (5th Cir. 1996). Whatever legal barriers may have existed under Mississippi law, petitioner was not foreclosed from collaterally attacking the use of his Mississippi convictions in the Louisiana courts where they served as predicates for declaring him a habitual offender under Louisiana law.

A. Petitioner Committed No Procedural Default By Exhausting His Remedies In The State Courts Of Louisiana Rather Than Mississippi

The fatal flaw in the Court of Appeals' analysis was its determination that petitioner was compelled to return to the Mississippi courts to attack his antecedent Mississippi convictions. Finding petitioner's Mississippi post-conviction remedies time-barred, the Court of Appeals summarily

declared him in procedural default and denied relief. 94 F.3d at 1007-08 (relying on *Sones*, 61 F.3d at 416-18).

Petitioner, however, is presently "in custody" (28 U.S.C. §2254(a)) pursuant to a judgment of conviction for armed robbery entered in the state courts of Louisiana in 1979. Under Louisiana's habitual offender law (La. Rev. Stat. §15:529.1), petitioner was adjudicated a multiple offender based upon his prior 1976 burglary convictions in Mississippi. Petitioner sought post-conviction relief in the Louisiana courts where he attacked the Louisiana sentencing court's enhancement based upon those prior Mississippi convictions, alleging that these predicates were unconstitutional under *Boykin v. Alabama*, 395 U.S. 238 (1969). (In particular, he attacked the Mississippi sentencing court's failure to advise him of the constitutional rights he was waiving by pleading guilty as well as the maximum possible sentence he might receive).

The Court of Appeals' reliance on *Sones*, then, was fatally flawed. Whatever relevance *Sones* may have to collateral attacks on Mississippi predicates in Mississippi habitual offender proceedings, it has none with respect to the use of Mississippi predicates in out-of-state (*e.g.*, Louisiana) habitual offender proceedings where the Louisiana courts entertain collateral attacks on the constitutionality of the out-of-state predicates. Notwithstanding the absence of Mississippi state remedies by which to attack these predicate Mississippi convictions, the state courts of Louisiana provided a presently available post-conviction remedy by which petitioner could (and did) attack the validity of these out-of-state convictions and their subsequent use against him in Louisiana habitual offender proceedings. *See* La. Code Crim. Proc. art. 924 *et seq.* (post-conviction relief statute); *see especially id.* art.

930.3(1)(collateral attack available for violations of the Constitutions of Louisiana and the United States).[2]

B. The Federal Courts Could Properly Entertain Petitioner's Attack On The Enhancement Of His Louisiana Sentence With Predicate Convictions From Mississippi Where The Louisiana Post-Conviction Courts Have Entertained His Enhancement Claims

To the extent that petitioner attacked his Mississippi convictions insofar as they were used as predicates to enhance his Louisiana sentence under the latter state's habitual offender law, he is presently "in custody" (§2254(a)) pursuant to his Louisiana conviction as enhanced by his earlier Mississippi predicates. He thus has standing to collaterally attack the use of his earlier Mississippi predicates in the state and federal courts of Louisiana. *See Maleng v. Cook*, 490 U.S. 488, 494 (1989); *Garlotte v. Fordice*, 115 S.Ct. 1948, 1952 n.4 (1995) (*Maleng* "left open the possibility . . . that the conviction underlying the expired sentence might be

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[2] Louisiana case law is fully in accord. *See, e.g., State v. Shelton*, 621 So.2d 769, 773 & n.8, 775 & n.14, 776 n.15 (La. 1993)(adopting *Parke v. Raley* [506 U.S. 20 (1992)] standard for use of prior guilty plea convictions as predicate offenses in multiple offender proceedings; applicable to post-conviction attacks on out-of-state predicates); *State v. Youngblood*, 647 So.2d 1388, 1389-90 (La. Ct. App. 1994)(post-conviction relief available to attack out-of-state convictions in multiple offender proceeding); *State v. Martin*, 427 So.2d 1182, 1186, 1187 (La. 1983)(post-conviction relief available to multiple offender whose predicate conviction is based on an uncounseled guilty plea); *State v. Wilson*, 599 So.2d 321, 322 (La. Ct. App. 1992)(post-conviction relief available to attack habitual offender proceeding where defendant was not informed of his constitutional right to remain silent with respect to predicate convictions); *State v. Johnson*, 548 So.2d 1274, 1275 (La. Ct. App. 1989) (accord).

subject to challenge in a collateral attack upon the subsequent sentence that the expired sentence was used to enhance"); *Custis v. United States*, 511 U.S. 485, 512 n.7 (1994)(Souter, J., dissenting)("Court of Appeals decisions postdating *Maleng* have uniformly read it as consistent with the view that federal habeas courts may review prior convictions relied upon for sentence enhancement and grant appropriate relief"); *Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994)("Because a person currently serving a sentence that was enhanced on the basis of a prior conviction is still in custody, he may challenge the enhancing conviction as constitutionally invalid even though that conviction's prior sentence has expired"); *Tredway v. Farley*, 35 F.3d 288, 295 (7th Cir. 1994)("'[O]nce the State breathes new life into a dormant conviction, it only seems appropriate that the defendant should then have the opportunity to challenge the conviction's validity'"); *Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993)("'positive and demonstrable nexus between . . . current custody and the allegedly unconstitutional [prior] conviction' . . . [is] 'sufficient to meet the jurisdictional requirements of §2254(a)'"); *Crank v. Duckworth*, 905 F.2d 1090, 1091 (7th Cir. 1990)("*Maleng* holds that when sentence A has expired but has been used to augment sentence B, the prisoner is 'in custody' only on sentence B. The consequences of sentence A for sentence B do not yield continued custody *on sentence A*. * * * [But] a person in custody on sentence B may contend that *that* custody violates the Constitution if it was augmented because of an invalid sentence A")(emphasis in original).

Nor are any federalism or comity concerns violated by virtue of the state and federal courts of Louisiana entertaining collateral attacks on Mississippi convictions insofar as they

are used to enhance Louisiana sentences. As analogized by the Seventh Circuit in precisely this context (*Smith v. Farley*, 25 F.3d at 1368 n.10):

> Suppose State A imposes the first conviction and State B the second. State B may offer the defendant review of his earlier State A conviction only as far as its new use in State B. Since such a defendant would not be seeking to set aside his State A conviction as constitutionally invalid, but merely to challenge the constitutionality of his conviction as used to enhance his present sentence in State B, principles of federalism, comity, and full faith and credit are not as directly implicated.

Accordingly, where the state and federal courts of Louisiana entertained collateral attacks on petitioner's prior Mississippi convictions as predicates for his Louisiana habitual offender sentence, petitioner was not obligated to seek post-conviction relief from the Mississippi state courts; *a fortiori* there was no procedural default committed in this case. Under the circumstances, then, the state did not "waive" a procedural default that, indeed, never occurred. Since this Court has noted that the federal courts are not obliged to honor state procedural rules more sedulously than do the state courts themselves — *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989)("if the state court under state law chooses not to rely on a procedural bar . . . , then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim") — the Court of Appeals committed clear error in relying *sua sponte* on a procedural default that, in fact, never existed. Standing by itself, this error warrants summary vacatur of the Court of Appeals' judgment irrespective of the question of the state's alleged "waiver" of the (nonexistent) procedural default.

II. THE STATE'S WAIVER OF PROCEDURAL DEFAULT ORDINARILY SHOULD BIND THE COURT OF APPEALS ABSENT A JURISDICTIONAL DEFECT OR THE RARE INSTANCE OF A CLEARLY ARTICULATED NONJURISDICTIONAL VALUE THAT TRANSCENDS THE INTERESTS OF THE PARTIES

This Court has held repeatedly that where the state fails to apprise the federal courts in a timely fashion of a state procedural bar, the procedural default rule does not preclude federal habeas relief. Consequently, if state prosecutors — or the state courts themselves — choose not to notice a default — or fail to make any such assertion in a timely manner — the federal courts show no disrespect for the state's interest by reaching the merits. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 420-21 n.5 (1991)(Court declines to consider adequate and independent state procedural ground in part because the state has failed to assert it in timely fashion); *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980)(state waived procedural default claim by stating in certiorari response that issues were "fully considered" and "correctly decided" by state courts); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980)(*Sykes* defense waived when not asserted in lower federal courts); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981)(accord); *Ulster County Court v. Allen*, 442 U.S. at 152 (state's attorney's failure to raise procedural bar in state courts suggests state courts rejected claims on merits).

Moreover, this Court has regularly determined that various habeas defenses such as exhaustion of state remedies, procedural default, nonretroactivity and abuse of the writ are nonjurisdictional in nature and may be waived by the state absent their timely assertion. *See, e.g., Schiro v. Farley*, 510

U.S. 222, 227-28 (1994)(*Teague* nonjurisdictional); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)(abuse of the writ nonjurisdictional); *Harris v. Reed*, 489 U.S. at 265 n.12 (procedural default nonjurisdictional in habeas); *Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996)(accord); *Granberry v. Greer*, 481 U.S. at 132 (exhaustion nonjurisdictional).

The lower federal courts have held similarly that waiver and forfeiture are not doctrines that apply one-sidedly only against habeas petitioners. Rather, the state may also forfeit a procedural defense by failing to assert it in a timely manner and at the appropriate point in the course of habeas litigation. *See, e.g., Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)(the state "waived waiver" by failing to assert it in a timely manner)(collecting cases); *Henderson v. Thieret*, 859 F.2d 492, 497-98 (7th Cir. 1988)(accord); *see also Falconer v. Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990)("Waiver is not an obstacle reserved for habeas petitioners alone"); *Smith v. Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989)(*en banc*) (Kravitch, J., concurring)("Waiver of claims is not a principle that works only to the detriment of [habeas] petitioners"); *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994)(Stevens, J., dissenting)("In recent years, the Court has fashioned harsh rules regarding waiver and claim forfeiture to defeat substantial constitutional claims. If we are to apply such a strict approach to waiver in habeas corpus litigation, we should hold the warden to the same standard").

In this case, of course, there was no "waiver" at all, strictly speaking. Rather, the state has explicitly *conceded* that petitioner properly exhausted his state remedies by having litigated his claims through the Louisiana — rather than Mississippi — state courts. *See* Point I, *supra*. There is, thus, no waiver by default or a merely implicit waiver by the state. Accordingly, the Court of Appeals should have been

required to set forth some countervailing policy consideration inherent in the "exigencies of federalism" (*Fay v. Noia*, 372 U.S. 391, 433 (1963)) or "considerations of comity" (*Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)) to justify its permissive authority to act *sua sponte*. The only policy prescriptions even remotely applicable here, however, have no application in the case of procedural default, whatever their possible relevance in the context of exhaustion.

In *Granberry v. Greer*, 481 U.S. at 134-35, this Court indicated its "reluctance to adopt rules that allow a [habeas] party to withhold a defense [here, nonexhaustion] until after the 'main event' — in this case the proceedings in the District Court — is over". It ruled, however, that when the state fails to raise an "arguably meritorious nonexhaustion defense", "[t]he court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring . . . additional state and district court proceedings". *Id.* at 134-35.[3]

These federalism considerations have no application here. Unlike the nonexhaustion situation, where the state courts have had no prior opportunity to consider petitioner's claims (and the federal courts may have an interest in affording the state courts that first opportunity where an unresolved question of state or federal law may be involved), the state

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[3] While the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996)) has changed the waiver standard applicable to the exhaustion defense, requiring that such waivers be express and forbidding state waivers by default — *see* newly-enacted 28 U.S.C. §2254(b)(3) — the new standard has no application in this case. This Court has recently determined that the new habeas statute applies only prospectively to federal habeas proceedings commenced after its April 24, 1996 enactment. *See Lindh v. Murphy*, 65 U.S.L.W. 4557 (U.S. June 23, 1997).

courts here have already considered petitioner's claims and denied relief on the merits.

Thus, notwithstanding *Granberry*'s reliance on the unique attributes of the exhaustion doctrine that distinguish it from procedural default — e.g., exhaustion's applicability when federal review may be postponed, but not foreclosed, pending invocation of available state remedies — a state's explicit waiver of procedural default, unlike its waiver of exhaustion, removes *all* bases for federal court reliance on the default, as the adequate and independent ground rule protects only the interests of the states and none of the federal courts. *See Harris v. Reed*, 489 U.S. at 265 n.12; *Ulster County Court v. Allen*, 442 U.S. at 152-54. Accordingly, the state's waiver of procedural default should require the federal courts to reach the merits of petitioner's claims. *Cf. Hagen v. Utah*, 510 U.S. 399, 410 (1994)("We see no reason to consider an argument that [Hagen] not only refuses to raise but also expressly refused to rely upon"); 2 James S. Liebman & Randy Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §22.1 at 647 n.39 & §26.2a at 816-17 n.2 (2d ed. 1994).

Here, then, where the state courts have had a first opportunity to consider petitioner's claims, and have not invoked procedural default, there are no aspects of comity or federalism which warrant the federal courts according greater deference to state procedural rules than have the state courts themselves, particularly where the state's attorney — the state's designated representative in the federal courts — has not requested it.

III. THE COURT OF APPEALS ERRED IN "SANDBAGGING" THE LITIGANTS BY CONSIDERING PROCEDURAL DEFAULT *SUA SPONTE* WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

While the Court of Appeals tartly chided the parties for failing to cite or discuss *Sones v. Hargett*, *supra*, in their briefs and oral argument (94 F.3d at 1007 n.2), in retrospect, the parties correctly analyzed the applicable principles of federal and (Louisiana) state law; *Sones* was (and is) manifestly irrelevant to the correct disposition of this case. Had the Court of Appeals first sought guidance from the parties on this question, rather than addressing it peremptorily in denying relief, the lower court might well have avoided plain error under both federal and Louisiana law. *See, e.g., Esslinger v. Davis*, 44 F.3d 1515, 1526, 1528 & n.45 (11th Cir. 1995)(magistrate judge's *sua sponte* invocation of procedural default was "based on a rank misinterpretation of Alabama law" and "district court's misapplication of a state procedural bar").

This Court has warned litigants that they may not "sandbag" their adversaries or the courts by strategically withholding seasonable claims and defenses only to belatedly spring them unannounced at some later phase of the litigation. *Wainwright v. Sykes*, 433 U.S. at 89. This principle applies with equal measure to the courts of appeals, which should not spring new claims or defenses not addressed by the parties in earlier phases of the litigation without — at an irreducible minimum — affording the parties an opportunity to address and respond to newly-arisen developments in the litigation. *See Esslinger*, 44 F.3d at 1528 ("we think it fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for

the default. In this case, the magistrate judge, and the district court, effectively 'sandbagged' the petitioner").

Under similar circumstances, the courts of appeals themselves have repeatedly cautioned that, whether the defense be exhaustion, procedural default, nonretroactivity or abuse of the writ, where it is raised by the district court in the first instance, the habeas petitioner must be given an appropriate opportunity to respond to the defense. *See Lugo v. Keane*, 15 F.3d 29, 30-31 (2d Cir. 1994)("No principle is more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him"); *accord*: *United States v. Cullum*, 47 F.3d 763, 764 (5th Cir. 1995); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (10th Cir. 1992); *Urdy v. McCotter*, 773 F.2d 652, 656-57 (5th Cir. 1985); *Esslinger*, 44 F.3d at 1528.

Here, the Court of Appeals' *sua sponte* reliance on Mississippi procedural law appears to have been based upon a misinterpretation of Louisiana (and federal) law. Had the lower court first given the parties an opportunity to respond to its contemplated course of action, it could have been quickly disabused of its misinterpretation and promptly turned its attention to the merits of petitioner's claims.

Accordingly, this Court, acting in its supervisory capacity, should underscore that where the lower federal courts exercising habeas jurisdiction contemplate consideration of a potentially dispositive claim or defense not raised by the parties, the litigants must first be given notice and an opportunity to be heard on the issue.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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